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WHY CAN'T WE BE FRIENDS?: WHY CALIFORNIA NEEDS A LIFESTYLE DISCRIMINATION STATUTE TO PROTECT EMPLOYEES FROM EMPLOYMENT ACTIONS BASED ON THEIR OFF-DUTY BEHAVIOR

Jean M. Roche*

I. INTRODUCTION

As social networking becomes increasingly popular, the perils of participating are beginning to outnumber the benefits. Increased social networking and blogging and the proliferation of cameras, smart-phones, and digital media has fundamentally changed the concept of privacy, particularly in the employment context. Although private employers have always tried to obtain data about their current and prospective employees to decrease the possibility of future indiscretion by their employees,¹ employees are making it much easier for employers to find and use this information against them in employment decisions. As a result of rapid information sharing, private employees are at greater risk of lifestyle discrimination, and in order to combat this danger, California should pass a lifestyle discrimination statute.

Lifestyle choices made during off-duty hours are now easily chronicled on a number of social networking sites² and the potential for employers to use these choices against current employees has increased. Behaviors such as smoking, drinking, and participating in high risk activities all have economic impacts on employers,³ however, employers

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1. Terry Morehead Dworkin, *It's My Life – Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 47 (1997).

2. For example, it is easy to update your “status” on www.facebook.com or to send Twitter.com updates. Both of these websites can now be accessed by mobile phone as well. Facebook Mobile, FACEBOOK.COM, <http://www.facebook.com/mobile/> (last visited Mar. 4, 2010); Twitter on Your Phone, TWITTER.COM, <http://twitter.com/about> (last visited Mar. 4, 2010).

3. *Lifestyle Discrimination in the Workplace Your Right to Privacy Under Attack*, AMERICAN

should not be able to use this off-duty legal behavior to make employment decisions. In an age where a great deal of personal information is stored online, it is all too easy for an employer to find out about off-duty behavior and use it against an employee. To prevent such abuse of information, lifestyle statutes can protect employees and clarify employer rights with regard to information gathered about employees through social networking websites.

This Note explores the implications social networking has on current private employees in regard to off-duty, off-site behavior and the protection that a lifestyle discrimination statute could provide to California private employees. In Part II, this Note begins with an overview of the increasing use of social networking both within the employment context as well as in society as a whole. Part III examines current privacy protections under federal and California law, including the tort claim of wrongful termination in violation of public policy and California Labor Code sections 96(k) and 98.6. The Note then shifts to an overview of lifestyle discrimination, briefly assessing lifestyle discrimination statutes that have been adopted in Colorado and New York. Ultimately, the Note concludes that California should adopt a statute that would provide protection to employees who are terminated for off-duty, off-site behavior, that does not impact a legitimate business interest.

II. BACKGROUND: SOCIAL NETWORKING AND THE INTERNET

Facebook currently has over 400 million active users,⁴ MySpace has more than 100 million monthly users around the world,⁵ YouTube has twenty hours of video uploaded every minute,⁶ and Twitter, the micro-blogging site, has 75 million users.⁷ With these staggering numbers of people using social networking, privacy infringement is bound to occur and the data contained on these sites will inevitably be used in employment decisions. Although standard background checks will often turn up a good deal of information on a potential employee, the internet and, specifically social networking sites, provide a nearly bottomless resource of

CIVIL LIBERTIES UNION, (Mar. 06, 2002), http://www.aclu.org/racial-justice_womens-rights/lifestyle-discrimination-workplace-your-right-privacy-under-attack.

4. FACEBOOK.COM, <http://www.facebook.com/press/info.php?statistics> 50% (last visited Mar. 4, 2010). Of these 400 million users, half log on to Facebook in any given day and more than 35 million users update their status each day. Additionally, more than 3 billion photos are uploaded to the site each month.

5. MYSPACE.COM, <http://www.myspace.com/pressroom?url=/fact+sheet/> (last visited Mar. 4, 2010).

6. YOUTUBE.COM, http://www.youtube.com/t/fact_sheet (last visited Mar. 4, 2010).

7. NUMBEROF.NET, <http://www.numberof.net/number-of-twitter-users/> (last visited Mar. 4, 2010).

information about prospective as well as current employees.⁸

While federal and state laws protect employees against certain types of discrimination, employers can and do use the information they acquire from online searches in hiring new employees,⁹ as well as in disciplining current employees.¹⁰ Private employers do have the right to look into the personal information of their employees when the employees are at work.¹¹ Specifically, employers have the right to read employee email,¹² listen to employee phone calls,¹³ and monitor computer use.¹⁴ Employers are also beginning to protect themselves from infringing employee privacy by warning employees that their behavior online is being monitored.¹⁵ However, despite the fact that employees are warned that their online behavior at work is being monitored, employees continue to use company property to access online social networking sites.

Although employers do have rights when it comes to monitoring employee behavior while on-site and on-duty,¹⁶ information on social networks can be used to monitor employee off-site, off-duty behavior. As

8. This Note does not focus on pre-screening of applicants, but rather on data retrieved from social networking sites in regard to current employees. With regard to pre-screening employees, employers may make an argument that they can be held liable under the doctrine of negligent hiring if they do not research job candidates on social networking sites. See Robert Sprague, *Rethinking Information Privacy in an Age of Online Transparency*, 25 HOFSTRA LAB. & EMP. L.J. 395, 397-401 (2008).

9. Mary Swanton, *Private Practices*, INSIDE COUNSEL, Nov. 1, 2009, at 69, available at <http://www.insidecounsel.com/Issues/2009/November-2009/Pages/Private-Practices.aspx>.

10. Pietrylo v. Hillstone Restaurant Group, No. 06-5754, 2009 WL 3128420, at *1 (D.N.J. Sept. 25, 2009) (where employees were fired for complaining in an online discussion group about the employer).

11. *Fact Sheet 7: Workplace Privacy and Employee Monitoring*, PRIVACY RIGHTS CLEARING HOUSE, <http://www.privacyrights.org/fs/fs7-work.htm> (last visited Mar. 4, 2010) [hereinafter PRIVACY RIGHTS CLEARING HOUSE].

12. *Id.* (citing *Bourke v. Nissan*, No. B068705 (Cal. Ct. App. July 26, 1993), available at http://www.loundy.com/CASES/Bourke_v_Nissan.html).

13. However, under the Electronic Communications Privacy Act (ECPA) there are some limitations with regard to employee's personal phone calls even when made on company property. Electronic Communications Privacy Act, 18 U.S.C. §§ 2520, 2702 (1986).

14. Text messages have warranted somewhat different treatment. In a recent Ninth Circuit case, *Quon v. Arch Wireless, et al.*, 529 F. 3d 892, 905 (9th Cir. 2008) (holding that employers must either have a warrant or the employee's permission to see messages that are not stored by the employer or by someone the employer pays for storage); see also *9th Circuit Rules on Text Message Privacy*, LAW.COM (July 15, 2008), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202422970200>. On June 17, 2010, the Supreme Court reversed and remanded the case holding that the search of Quon's text messages, which were stored on a government-owned pager, was reasonable and therefore was not a violation of his Fourth Amendment rights. *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). See also PRIVACY RIGHTS CLEARING HOUSE, *supra* note 11.

15. See *Sporer v. UAL Corp.*, No. C 08-02835, 2009 WL 2761329, at *2 (N.D. Cal. 2009) (where employee had no expectation of privacy on an email sent through the company's email system when the employer had a practice of monitoring employee computer use, warned employees they had no expectation of privacy with regard to company email and employees had to click through a warning in regard to privacy to access the company computer system).

16. PRIVACY RIGHTS CLEARING HOUSE, *supra* note 11.

noted in a recent online article, “[w]e now place greater value on being open about ourselves, since personal reputation is increasingly influenced by what others know about us online.”¹⁷ In this new era of openness, employees are growing careless with regard to the type of information that is freely available for viewing by their employers, which may result in adverse employment actions against them by their employer.

Private employers have a financial interest in the reputation and portrayal of their business, which leads employers to review the behavior of their employees in the first place.¹⁸ Employees who tarnish that reputation with racy photographs, condemnations of their employer, or other information that could potentially hurt the business of the employer may find themselves terminated for their online actions. However, there is a great deal of online behavior that does not directly affect the business interests of the employer and thus, should not be used against the employee through adverse employment actions.

Today, many of us would balk at an employer who would place private detectives, posing as employees, in the workplace to spy on and collect personal information from current employees.¹⁹ Our collective understanding of privacy makes us averse to working under conditions that create such suspicion among co-workers and place our privacy in jeopardy. However, employees constantly place that same type of information online where employers can access the information without the price of hiring a private investigation company. The law is still somewhat ambiguous on the subject of what material is private when posted online, either as part of a social networking site or as part of a blog, and for this reason there is increased risk to employees when they place personal information online that they do not wish their employers to have access to. The risks of social networking on employment have been well documented in online articles and blogs,²⁰ yet, employees continue to use websites such as Facebook.com and Myspace.com.

Employee understanding of restrictions enacted by employers is also somewhat limited.²¹ Employees often accept terms of employment, such as monitoring by employers, without any real valuation of the privacy rights they are waiving in the context of their employment. Employers are able to

17. Harry A. Valetk, *Off the Clock: Should Your Personal Online Chronicles Jeopardize Your Career?*, LAW.COM (Feb. 5, 2008), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202136231178>.

18. Renee Jackson, *Social Media Permeate the Employment Life Cycle*, NATIONAL LAW JOURNAL (Jan. 11, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202437746082&slreturn=1&hbxlogin=1>.

19. See *Johnson v. Kmart Corp.*, 723 N.E. 2d 1192, 1196–97 (Ill. App. Ct. 2000).

20. See generally *Social Networks Put Careers At Risk, Survey Finds*, EURACTIV.COM (Feb. 1, 2010), <http://www.euractiv.com/en/Social-networks-careers-risk>.

21. See Jason Bosch, Note, *None of Your Business (Interest): The Argument for Protecting All Employee Behavior with No Business Impact*, 76 S. CAL L. REV. 639, 640 (2003) (providing and extensive study of the market effect on at will employment).

contract into monitoring employee behavior because the labor market fails to value the freedoms inhibited by employers.²² However, even when employees knowingly consent to waiving some rights to privacy in the workplace, waiving privacy off-duty and off-site is another matter all together.²³

In a recent survey by Deloitte LLP, sixty percent of business executives believe they have “the ‘right to know’ how employees portray themselves and their organizations online,”²⁴ which supports the proposition that if employers can find information about their employees online, they probably will. Once employers find this information, it is another matter of what they can legally do with this information. In the same Deloitte study, “fifty-three percent of the employees contend that ‘social networking pages are none of an employer’s business.’”²⁵ However, whether or not employees believe employers should look at this information, employers are accessing it and may be using it to make employment decisions. Without legislation to protect off-duty behavior, employers who feel entitled to read employees’ social networking pages will be able to make employment decisions based on behaviors not necessarily related to any legitimate business interest and will be able to terminate employees for personal conduct simply because it is documented online.

III. PROTECTING EMPLOYEE PRIVACY

California is an at-will employment state.²⁶ As such, employers can terminate employees at any time for any reason simply by putting the employee on notice of their termination.²⁷ The broad discretion given to

22. See Bosch, *supra* note 21.

23. See, e.g., *New York v. Walmart Stores*, 9 Indiv. Empl. Rts. Cas. 143, 177 (N.Y. Sup. Ct. Dec. 16, 1993) *rev’d sub nom.* *State v. Wal-Mart Stores*, 621 N.Y.S.2d 158 (N.Y. App. Div. 1995) (two employees were terminated for dating each other even though the behavior surrounding their dating occurred off-site and off-duty).

24. DELOITTE LLP, 2009 ETHICS AND WORKPLACE STUDY 5–6 (May 28, 2009), *available at* http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf.

25. *Id.*

26. Cal. Lab. Code § 2922 (West 2009) (“An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.”).

27. There are some exceptions to when an employee may be protected. See *Pugh v. See’s Candies*, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981) (stating that the totality of the employment relationship must be scrutinized to determine if there was an implied-in-fact employment contract); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (Cal. 1988) (expanding types of situations in which the implied-in-fact contract exception could apply). Additionally, at will employment may be overcome by express agreement, statutory exceptions or public policy. AMY C. STOHON, THOMAS C. WELSHONCE & J. DANIEL HULL, HULL MCGUIRE PC, IS CALIFORNIA STILL AN AT-WILL EMPLOYMENT STATE? 1 (2006), *available at* <http://www.hullmcguire.com/pdf/Hull%20McGuire%20-%20California%20At-Will%20Employment>

employers in an at-will employment situation places employees at risk for termination based on their off-duty, off-site behaviors, even if those actions do not impact the business interests of the employer. Additionally, this off-duty, off-site behavior is often considered by the employee to be private.²⁸ Given the relatively feeble protections currently in place in California, and the increasing number of users on social networking sites and blogs, the potential for this off-duty behavior to be discovered and used against employees is growing tremendously.

A. FEDERAL LAW

1. *Statutes*

A number of federal statutes protect employees, including, Title VII,²⁹ the Equal Pay Act of 1963,³⁰ the Age Discrimination in Employment Act of 1967,³¹ and the Americans with Disabilities Act of 1990.³² However, there are many groups of people who are not protected under the federal statutes.³³ These federal statutes prohibit discrimination against certain classes of people because an employer can rarely show a legitimate business interest in discriminating for reasons not associated with their employees' ability to fulfill job requirements. Additionally, the protections afforded by federal statutes only protect employees from adverse action by their employers when that adverse action is based on the employee's membership in one of these protected classes.³⁴

Although these statutes do not provide an explicit privacy protection, employers are prohibited from making employment decisions based on an employee or prospective employee's membership in one of these groups.³⁵ It is dangerous for employers to use information found through social networking sites to make employment decisions because social networking pages often include information such as religion, gender, ethnicity, national origin, race, or sexual orientation,³⁶ which are protected classes under

%20Doctrine.pdf.

28. DELOITTE LLP, *supra* note 24 at 6.

29. *See generally* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006).

30. *See generally* Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2006).

31. *See generally* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006).

32. *See generally* Americans With Disabilities Act, 42 U.S.C. §§ 12101–12213 (2006), *amended by* ADA Amendments Act of 2008, Pub. L. 110-325, § 3, 122 Stat. 3554 (prohibits employment discrimination against qualified individuals with disabilities in the private sector and in state and local governments).

33. These groups of people include smokers, people who are overweight, and people who take part in high risk activities.

34. *See* 42 U.S.C. § 2000e-2(a); 29 U.S.C. § 206(d)(1); 29 U.S.C. § 621.; 42 U.S.C. §§ 12112.

35. *See* 42 U.S.C. § 2000e-2(a); 29 U.S.C. § 206(d)(1); 29 U.S.C. § 621.; 42 U.S.C. §§ 12112.

36. *See, e.g.,* FACEBOOK.COM, *supra* note 4 (users may enter their religion, gender and sexual orientation, all of which are protected to some extent by the federal statutes).

federal law.³⁷ Moreover, most social networking sites allow users to post pictures of themselves and their families,³⁸ which could potentially reveal more protected information.³⁹ However, even with these federal prohibitions on using protected information, employers are using social networking sites to make employment decisions.⁴⁰

2. *United States Constitution*

The United States Constitution does not explicitly provide a right to privacy, although the Supreme Court has recognized that the right to privacy is “fundamental.”⁴¹ The right to privacy under the United States Constitution is not particularly expansive, but it has been extended to include personal decisions including marriage,⁴² procreation,⁴³ and sexual conduct.⁴⁴ Privacy on the internet has become an emerging issue and is one that is sure to come before the Supreme Court at sometime in the near future. However, under the current state of the law, without any other type of privacy infringement, employee privacy is not currently protected under the United States Constitution.

B. CALIFORNIA LAW

1. *Privacy Rights*

Unlike the United States Constitution, the California Constitution explicitly reserves a right to privacy.⁴⁵ Article I, section 1 of the California

37. See 42 U.S.C. § 2000e-2(a); 29 U.S.C. § 206(d)(1); 29 U.S.C. § 621.; 42 U.S.C. §§ 12112.

38. Other rights and protections may be implicated if an employer took adverse action against an employee based on his or her familial situation. See Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et. seq.* (2005). However, these protections are also inadequate to protect and employee in an age of social networking. The FMLA is limited to employers with 50 or more employees within a 75 mile radius who have been employed for more than a year and worked at least 1,250 hours in the preceding year. 29 U.S.C. § 2611(2).

39. See FACEBOOK.COM, *supra* note 4; see MYSPACE.COM, *supra* note 5.

40. Lauren Williamson, *Employers Increasingly Look at Social Networks When Making Hiring Decisions*, INSIDE COUNSEL (Sept. 15, 2009), <http://www.insidecounsel.com/News/2009/9/Pages/Employee.aspx> (stating that a survey commissioned by Career Builder found that forty-five of the 2,667 hiring managers surveyed reporting checking up on candidates' Facebook or Myspace profiles. Of those who checked the social networking sites thirty-five percent said that the information they found kept them from hiring a candidate. Though the employers cited reasons such as bad judgment, tasteless photos or comments or indications of alcohol or drug use, the employers were privy to protected information as well and this is likely to become a legal issue as to how to resolve how employers are using online content.).

41. *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965).

42. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

43. See *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold*, 381 U.S. at 486.

44. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

45. CAL. CONST. art. I, § 1.

Constitution states: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy.”⁴⁶ Unlike the federal right to privacy, which “arose in response to state intrusions on marital and parental decisions”⁴⁷ the right to privacy granted in the California Constitution “relat[ed] to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society.”⁴⁸ The California Supreme Court has held that the privacy provision is “self-executing” and “confers a judicial right of action on all Californians.”⁴⁹ As such, the privacy right is “effective immediately without the need of any type of implementing action.”⁵⁰ The privacy right is enforceable against all private parties, including employers.⁵¹ Although the right to privacy was adopted in the 1970s, the application of this right must evolve with increasing technology and data collection activity to protect individuals from the type of infringement it was intended to restrict.

The right to privacy enunciated in the California Constitution has acted as a limitation on private employers’ conduct in drug testing,⁵² psychological screening,⁵³ and termination based on marriage.⁵⁴ “By requiring such compelling justifications for upholding terminations based on invasion of the privacy right, California courts provide a high level of protection for that right.”⁵⁵ However, these limitations do not protect the privacy of all legal off-duty conduct, and the protection is in fact, fairly limited. The current limitations on employer infringement upon employee privacy involve extremely personal matters, including taking substances from the body of an employee.⁵⁶ Searching for employees online to review

46. CAL. CONST. art. I, § 1.

47. Erich Shiners, Comment, *Keeping the Boss Out of the Bedroom: California’s Constitutional Right of Privacy as a Limitation on Private Employers’ Regulation of Employees’ Off-Duty Intimate Association*, 37 MCGEORGE L. REV. 449, 456 (2006).

48. *White v. Davis*, 533 P.2d 222, 233 (Cal. 1975).

49. *Porten v. University of San Francisco*, 134 Cal. Rptr. 839, 842 (Cal. Ct. App. 1976).

50. BLACK’S LAW DICTIONARY 1482 (9th ed. 2009).

51. *Barbee v. Household Auto. Fin. Corp.*, 6 Cal. Rptr. 3d 406, 410 (Cal. Ct. App. 2003) (“Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone.” (quoting *Porten*, 134 Cal. Rptr. at 842)).

52. *Luck v. S. Pac. Transp. Co.*, 267 Cal. Rptr. 618, 631–32 (Cal. Ct. App. 1990) (finding that the employer did not have a compelling reason to infringe and employee’s privacy through urine testing when her job did not involve safety); see Shiners *supra* note 47, at 475–76.

53. *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 84 (Cal. Ct. App. 1991) (“[E]mployees may not be compelled to submit to a violation of their right to privacy unless a clear, direct nexus exists between the nature of the employee’s duty and the nature of the violation.” (citing *Luck*, 267 Cal. Rptr. at 632)).

54. *Ortiz v. L.A. Police Relief Ass’n Inc.*, 120 Cal Rptr. 2d 670, 678–79 (Cal. Ct. App. 2002) (noting that the right to marry is fundamental).

55. Shiners, *supra* note 47 at 480.

56. *Luck*, 267 Cal. Rptr. at 618.

their off-duty conduct does not have the same physical impact on an employee's privacy, though it may result in a similar degree of invasion. Activities chronicled on social networking sites include weddings, religious ceremonies, hobbies, membership in particular organizations, and a number of other personal and private behaviors. Arguably, the intimate view into employees' lives that social networking sites provide to employers is just as, if not more, invasive than conducting a drug test.

Another hurdle when asserting the right to privacy in the private employment context is the elements that must be met in order to state a claim for invasion of privacy. In California, to allege an invasion of privacy in violation of the state constitutional right to privacy, a plaintiff "must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy."⁵⁷ Proving an invasion of privacy is difficult in an employment context because based on the rights of employers to monitor employees, employees rarely have a reasonable expectation of privacy, especially in regard to internet communications. "The extent of [a privacy] interest is not independent of the circumstances,"⁵⁸ and particularly in the context of private employment, it is difficult to show that the "customs, practices and physical settings"⁵⁹ create a reasonable expectation of privacy. Employees who use company computers do not have a reasonable expectation of privacy regarding what they do on those computers.⁶⁰ Employees may be disciplined or fired if their emails violate company policy or the law.⁶¹ Emails are frequently being used as evidence during unlawful discharge trials to show employee misconduct or wrongdoing.⁶² With these restrictions on privacy in the workplace, it is nearly impossible for a private employee to prove that he had a reasonable expectation of privacy while at work. However, this doctrine should not be extended to allow monitoring of behavior outside of the workplace.

As a matter of law, it is currently unclear if individuals can ever have a reasonable expectation of privacy with regard to online postings.⁶³ Although these sites have protections that allow only certain people to view the information, there are ways to get around these protections. Until the courts determine whether this type of information can be considered

57. *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 39–40 (1994).

58. *Id.* at 36–37.

59. *Id.*

60. PRIVACY RIGHTS CLEARING HOUSE, *supra* note 11.

61. *Id.*

62. *Id.*

63. In 2000, the Fourth Circuit held that under the Fourth Amendment, where an employee was informed that his work-related internet activity would be scrutinized by his employer, he had no legitimate expectation of privacy in fruits of his internet activity because he knowingly exposed such activity to the public. *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

private, it will be difficult for an employee to prove that his employer has invaded this privacy if the employer uses online information to take adverse action against the employee. While allowing the courts to make determinations as to the privacy status of online content would be one solution, it is a solution that would endanger employee privacy in the meantime.

The California Constitutional right to privacy is difficult to rely on in the employment context, particularly with regard to online information, and thus private employees must often look to other remedies when adverse action is taken against them.

2. *Wrongful Termination in Violation of Public Policy: California Labor Code Sections 96(k) and 98.6*

Due to the difficulty in proving privacy invasion with regard to online content, employees must often use other causes of action if they are terminated for off-duty, off-site behavior. California recognizes the tort claim of wrongful termination in violation of public policy,⁶⁴ which has not proved to be an adequate alternative to adoption of a comprehensive lifestyle discrimination statute. In order to establish a claim for wrongful termination in violation of public policy the employee must prove that he was terminated in violation of a policy that is “(1) delineated in either constitutional or statutory provisions; (2) ‘public’ in the sense that it ‘inures the benefit of the public’ rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental.”⁶⁵ Though this claim could be potentially powerful to protect private employees, stating a policy that will prevail by meeting the four requirements is often impossible to prove in the private employment context.

Considered to be a type of lifestyle discrimination statute to some degree, California Labor Code Sections 96(k) and 98.6 “do not create new substantive rights for employees,” but rather, they establish “a procedural mechanism that allows the [Labor] Commissioner to assert, on behalf of employees, their independently recognized constitutional rights.”⁶⁶ Without creating substantive rights, Labor Code section 96(k) and 98.6 provide no actual remedy and offer no protection to private employees with regard to wrongful termination in violation of public policy. Section 96 (k) reads:

The Labor Commissioner and his or her deputies and representatives authorized by him or her in writing shall, upon the filing of a claim therefor by an employee, or an employee representative authorized in

64. *Barbee*, 6 Cal. Rptr. 3d at 412.

65. *Stevenson v. Superior Court*, 16 Cal. 4th 880, 894 (1997).

66. 83 Ops. Cal. Atty Gen. 226, 229 (2000).

writing by an employee, with the Labor Commissioner, take assignments of: . . . (k) Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises.⁶⁷

Though this subsection seems to grant a great deal of protection to employees, it instead merely creates a procedural mechanism by which the Labor Commissioner can bring a case on behalf of the employee based on independently recognized constitutional rights.⁶⁸ If this subdivision created a substantive right or public policy which would prevail in a claim for wrongful termination in violation of public policy, private employees' off-duty conduct would be protected. However, instead of creating a public policy that can be enforced, it merely creates a procedure by which other substantive rights may be asserted by the Labor Commissioner. Though it is not automatically apparent why this distinction is important, current case law illustrates why the tort of wrongful termination in violation of public policy is nearly impossible to prove with regard to off-duty, off-site employee behavior.

In *Barbee v. Household Automotive Finance Corporation*,⁶⁹ plaintiff argued that his off-duty relationship was protected by Labor Code section 96(k) and should therefore be considered a public policy that creates substantive rights.⁷⁰ However, the court disagreed and stated that in order to prevail, Barbee would have to "establish that his employment was terminated because he asserted civil rights guaranteed by article I of the California Constitution."⁷¹ Though Barbee's relationship was protected under Labor Code section 96(k), he was unable to prevail on his claim for wrongful termination in violation of public policy because his off-duty behavior was not protected by a substantive right.

Given the outcome of *Barbee*, private employees will find themselves in a "Catch-22" situation. Because it is difficult and sometimes impossible to prove that there has been an invasion of privacy in violation of the California Constitution, private employees will pursue a claim for wrongful termination in violation of public policy. However, employees will likely be unable to prove a public policy has been violated. In order to do so they must prove that their termination invaded their right to privacy under the California Constitution. The claim for wrongful termination in violation of public policy, when involving privacy, is inextricably linked with a privacy violation under the California Constitution. It is nearly impossible for an employee to prevail on either claim. To protect private employees from invasion of privacy and wrongful termination, California must create a

67. CAL. LAB. CODE § 96 (West 2003).

68. *Barbee*, 6 Cal. Rptr. 3d at 412.

69. *Id.*

70. *Id.*

71. *Id.*

cause of action for employees who have been terminated based on information in regard to off-duty, off-site behavior or activities.

In passing subdivision (k) of the Labor Code in 1999, the California Legislature noted that:

[A]bsent the protections afforded to employees by the Labor Commissioner, an individual employee is ill-equipped and unduly disadvantaged in any effort to assert the civil rights otherwise guaranteed by Article I of the California Constitution. The Legislature further finds and declares that allowing any employer to deprive an employee of any constitutionally guaranteed civil liberties regardless of the rationale offered, is not in the public interest. The Legislature further declares that this act is necessary to further the state interest in protecting the civil rights of individual employees who would not otherwise be able to protect themselves.⁷²

The sentiment of the California Legislature is one of protection. Individual employees are disadvantaged when asserting their civil rights guaranteed by the state Constitution, including their right to privacy. However, as described above, it is nearly impossible to prove a claim of privacy infringement in violation of the California Constitution in the employment context. In noting their concern for individual employees, the California Legislature expressed their interest in protecting employees from privacy invasion by employers. However, the procedure created by the Labor Code does not actualize the intent of the Legislature.

IV. LIFESTYLE DISCRIMINATION

Currently approximately 29 states have some type of statutory protection for lifestyle discrimination.⁷³ These lifestyle discrimination statutes typically protect employees who smoke, drink alcohol, consume “lawful products,” or participate in “lawful conduct” off-duty and off the employer’s premises.⁷⁴ The categories of protected activity have developed in large part due to employers’ concerns about rising health care costs as well as liability created by employee behavior.⁷⁵ Lifestyle discrimination statutes seek to protect a variety of activities, including smoking, drinking, diet, weight, political or civic activities, leisure activity, moonlighting, personal relationships, and other legal activities.⁷⁶

72. 1999 CAL. STAT. 692 (Deering’s 2000).

73. NAT. WORKRIGHTS INST., LIFESTYLE DISCRIMINATION: EMPLOYER CONTROL OF LEGAL OFF-DUTY EMPLOYEE ACTIVITIES 12–13 (2008), available at http://www.workrights.org/issue_lifestyle/ldbrieff2.pdf.

74. See *id.*

75. Carol Lundberg, *Employers Have Some Rights To Know About Workers' Private Lives: When Does it Become Too Personal?*, MICH. LAWYERS WKLY., Apr. 27, 2009.

76. Stephen D. Sugarman, *Lifestyle Discrimination in Employment*, 24 BERKELEY J. EMP. & LAB. L. 377, 384–93 (2003) (noting illegal activities in which employers may or may not have a legitimate business interest in).

The common argument in support of adopting lifestyle discrimination statutes is to prevent employers from discriminating against employees for what they do during non-working hours.⁷⁷ Lifestyle discrimination statutes have the potential to extend protection against discrimination beyond the federal protections to categories, which include individual habits and personalities. Certain groups, in particular, are targeted and discriminated against for their lifestyle choices; California could better protect private employees from discrimination based on these choices by passing a lifestyle discrimination statute. Currently, when employers find out information about any employee's lifestyle that does not precisely comport with the image of the company, the employer can generally fire the employee so long as it does not violate another federal or state discrimination statute.⁷⁸

Although economics is a driving motivation for employers to discriminate against employees' off-duty behavior, economics alone should not be a legitimate reason to terminate an otherwise qualified employee.⁷⁹ With regard to obesity alone, more than 50 percent of men and nearly 50 percent of women would be unable to find employment based on their lifestyles choices.⁸⁰ If this same standard was applied to those who have pictures or information on social networks that alluded to irresponsibility, poor judgment, drinking, smoking, unhealthy eating, sexual behavior, or any number of other lifestyle decisions, most of us would be terminated. While some of these behaviors are potentially a liability to the employer, the employer should have to provide a legitimate business interest to justify taking adverse action against an employee for their off-duty, off-site behaviors.

A. COLORADO'S LIFESTYLE DISCRIMINATION STATUTE

Currently the most comprehensive lifestyle discrimination statute in the United States is a law that was passed in Colorado in 1995.⁸¹ Initially proposed by the tobacco lobby, the statute protects "any lawful activity off the premises of the employer during nonworking hours."⁸² Although this statute has been criticized,⁸³ Colorado's statute can be used as an instructive model for drafting lifestyle statutes in an age of social

77. *Lifestyle Discrimination in the Workplace*, *supra* note 3.

78. This is largely in part to the reliance on employment at will.

79. *See Lifestyle Discrimination in the Workplace*, *supra* note 3.

80. *Nutrition Online Media Kit: Fact Sheet*, UNIV. OF CAL., DIV. OF AGRIC. AND NATURAL RES., <http://news.ucanr.org/mediakits/Nutrition/nutritionfactsheet.shtml> (last visited Mar. 4, 2010).

81. COLO. REV. STAT. § 24-34-402.5 (Supp 1995); *see* Jessica Jackson, *Colorado's Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law*, 67 U. COLO. L. REV. 143 n. 5 (1996).

82. COLO. REV. STAT. § 24-34-402.4(1) (Supp 1995).

83. Jackson, *supra* note 81, at 143.

networking.

Although Colorado's lifestyle statute is very expansive, there are two exceptions as to when an employer can terminate an employee based on off-duty conduct.⁸⁴ These two exceptions are (1) the bona fide occupational requirement exception and (2) the conflict of interest exception.⁸⁵ Under these two exceptions, the employer is protected from employee action that may compromise the legitimate business interests of the employer while still maintaining expansive protection for employee off-duty conduct. Though the lifestyle statute has not been tested extensively in the Colorado courts, it "may offer protection based on sexual orientation, employee dating, political or social affiliation, smoking, dangerous sports, and sexual propriety (including transsexualism, unwed pregnancy, and adultery)."⁸⁶ With such vast coverage, it seems likely that if this information was obtained through searching social networks, employers would be unable to use this information to terminate employees for this behavior.

Without any realistic way to prevent employers from searching for employee information on social networking sites or the internet as a whole, the Colorado lifestyle discrimination statute provides protection even if information about an employee is found in this way. Under the Colorado statute, if an employer chooses to view an existing employee's online profile, any information that the employer finds unsavory or contrary to his

84. COLO. REV. STAT. § 24-34-402.5 states:

(1) It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction

(a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or

(b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

(2)(a) Notwithstanding any other provisions of this article, the sole remedy for any person claiming to be aggrieved by a discriminatory or unfair employment practice as defined in this section shall be as follows: he may bring a civil suit for damages in any district court of competent jurisdiction and may sue for all wages and benefits which would have been due him up to and including the date of the judgment had the discriminatory or unfair employment practice not occurred; except that nothing in this section shall be construed to relieve such person from the obligation to mitigate his damages.

(b) the court shall award the prevailing party in such action court costs and a reasonable attorney fee.

85. *Id.*

86. Jackson, *supra* note 81, at 147. Homosexuality has been protected under the Colorado lifestyle statute in *Borquez v. Ozer*, 923 P.2d 166, 171 (Colo. App. 1995), *rev'd on other grounds*, 940 P.2d 376 (Colo. 1997). Additionally, although time barred a Colorado court suggested that an employee's membership in the Klu Klux Klan, though not protected by Title VII as it is not considered a religion, may have been protected under the Colorado lifestyle statute. *Slater v. King Soopers, Inc.*, 809 F. Supp. 809, 810 (D. Colo. 1992).

own morals cannot be used against the employee unless the information falls under either the bona fide occupational requirement exception or the conflict to interest exception. In this way, the lifestyle statute provides protection for the employee's off-duty, off-site activities as well as protection for the employer's legitimate business interests. However, the statute is susceptible to being misconstrued by the courts because it was drafted in such a broad manner. As a result, both employer and employees cannot be sure of the legal standard the law creates.

B. NEW YORK'S LIFESTYLE DISCRIMINATION STATUTE

The only current lifestyle statute that seemingly goes beyond the protections provided by Colorado's lifestyle discrimination statute is a New York law.⁸⁷ Though Colorado's statute seemingly protects more "legal activities," New York's statute protects adverse employment actions against employees other than just termination. Though the case law that has developed under these two lifestyle statutes is sparse, it is useful to use these two models to examine a proper solution for California employees.

Similar to the passage of lifestyle statutes in other states,⁸⁸ New York's lifestyle discrimination statute was fostered by the tobacco lobby.⁸⁹ Though seemingly expansive, the New York lifestyle discrimination statute has been subject to some of the same pitfalls that the Colorado statute has experienced. Particularly in the realm of associational rights under the lifestyle discrimination statute, the New York courts have created some discrepancy as to what is covered.⁹⁰ In the first case⁹¹ decided by the New York courts, two employees were terminated for dating, while one of the employees was still married to another person.⁹² The court held that the dating was not considered to be a "recreational activity"⁹³ and therefore,

87. N.Y. LAB. LAW § 201-d(2) (McKinney 2009) which reads in relevant part:

2. Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

a. an individual's political activities outside of working hours, off the employer's premises and without use of the employer's equipment or other property, if such activities are legal . . . ;
b. an individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours . . . ;
c. an individual's legal recreational activities outside work hours . . . ;
d. an individual's membership in a union.

88. LIFESTYLE DISCRIMINATION, *supra* note 73.

89. See, e.g., Junda Woo, *Employee Fume Over New Legislation Barring Discrimination Against Smokers*, WALL ST. J., June 4, 1993, at B1.

90. Dworkin, *supra* note 1, at 53.

91. *Wal-Mart Stores*, 621 N.Y.S.2d 158.

92. *Id.*

93. N.Y. LAB. LAW § 201-d(2).

not protected by the lifestyle discrimination statute.⁹⁴

Two years later the New York courts took a more expansive view of “recreational activities” protected under the lifestyle discrimination statute. In *Pasch v. Katz Media Corp.*, the court expanded the definition of “recreational activity” to include cohabitation.⁹⁵ However, since this decision, the New York courts have returned to a less expansive definition of “recreational activity under the statute.” In 2000, the courts overruled their decision in *Pasch* instead choosing to follow the *Wal-Mart* decision.⁹⁶

Though the lifestyle discrimination statute that New York has enacted is a step in the right direction, it still suffers from the same ambiguity as the Colorado statute. To ensure the lifestyle discrimination provides protection to all off-duty, off-site activities, California must avoid the ambiguity created by both the Colorado and New York statutes.

V. A PROPOSAL FOR A LIFESTYLE DISCRIMINATION STATUTE IN CALIFORNIA

Though California allows for tort claims that Colorado does not permit, these remedies have not proven useful in all forms of lifestyle discrimination.⁹⁷ To fully protect employee social networking activity, it will be necessary to pass a lifestyle discrimination statute that exceeds the protection granted in Colorado and New York.

Due to the current uncertainty with regard to online privacy,⁹⁸ it is imperative to pass a lifestyle discrimination statute that will clarify the rights and protections for both employers and employees. California is on the cutting edge of technology in the nation and, as such, it is important to protect employees who utilize the available technologies. While some personal discretion and responsibility must be employed by the user of online social networking, legal protections must be created to preserve the privacy and rights of private employees.

While Colorado’s statute⁹⁹ is an excellent model to build from, it has left a great deal of discretion to the courts in regard to the exceptions to the statute. The bona fide occupational requirement exception and the conflict of interest exception may become expansive loopholes for employers to

94. *Wal-Mart Stores*, 621 N.Y.S. 2d at 159.

95. No. 94-CIV-8554, 1995 WL 469710, at *3–4 (S.D.N.Y. Aug. 8, 1995).

96. *McCavitt v. Swiss Reinsurance America Corp.*, 237 F.3d 166, 168 (2d Cir. 2001).

97. *Rulon-Miller v. IBM*, 208 Cal. Rptr. 524, 529 (Ct. App. 1984) (employee received damages for being terminated when company violated duty of good faith to deal openly and fairly with the employee and that this behavior amounted to extreme and outrageous conduct); *Collins v. Shell Oil Co.*, No. 610983-5 1991 WL 147364 (Cal. Super. Ct. 1991) (where employee prevailed on a claim of intentional infliction of emotional distress, bad faith and other tort and contract violations).

98. See generally *Monitoring Employees' Off-Duty Conduct*, Nolo.com, <http://www.nolo.com/legal-encyclopedia/article-29994.html> (last visited Mar. 4, 2010).

99. COLO. REV. STAT. § 24-34-402.5.

further perpetuate the practice of lifestyle discrimination. Without clarification by the courts, employers will be able to claim that any alleged indiscretion or allusion to questionable behavior on a social networking site may be considered a bona fide occupational requirement. By claiming that an employee's portrayal of himself on a social networking site compromises the image of the employer, the courts could find that the termination is legitimate because it falls under the exception. Although the language of the bona fide occupational requirement is similar to that of the federal discrimination statutes, it is unclear as to whether the burden on the employer will be as high for the lifestyle discrimination claims.

The current loopholes in the Colorado law with regard to privacy can be used extensively for the purpose of firing employees who post their behavior and activities online. If an employer has any reason to doubt an employee's capability or loyalty, he needs merely to search online for the employee, read through a blog or a Facebook page and, to be sure, these sources will yield information that is sufficient to meet the requirements of the loopholes in the lifestyle statutes. This is not to say that every employer will take such a route, but rather employers can do this if they deem it necessary or useful.

To prevent the pitfalls of the Colorado statute, California should develop a lifestyle discrimination statute that precludes extensive discretion by the courts to expand any exceptions to the statute.¹⁰⁰ Specifically, a California lifestyle discrimination statute should prohibit private employers from making employment decisions, including but not limited to termination, based on off-duty, off-site legal activities or behaviors that do not compromise the employee's ability to perform his job duties. With the proliferation of media, it is impossible to prevent employers from searching for their employees online; however, this statute would help prevent any information collected from social networking sites from being used against an employee.

Instead of creating a procedural mechanism for enforcing this statute, California should create a civil cause of action that individual private employees could pursue if they can show their employer based an employment decision on the employees off-duty, off-site legal behavior. Though employers will not always come across an employee's off-duty, off-site legal behavior online, as the use of online media and social networking continues to grow, it is a likely source of information for employers. An available cause of action will help protect employees from adverse employment actions in response to off-duty, off-site behavior.

A lifestyle discrimination statute in California would not create unbridled privacy or protection for employees, but rather would have

100. The National Workrights Institute has developed a model lifestyle discrimination statute that would also be instructive in developing a lifestyle statute for California. LIFESTYLE DISCRIMINATION, *supra* note 73.

similar restrictions to those in Colorado. However, the California legislature should develop a definition of “bona fide occupational requirement” and should list examples of such requirements as well as legitimate business interests. In particular, this exception should prevent employers from stating that the behavior is merely against the business interest, but would raise the standard to ensure that the employee’s behavior was fundamentally incompatible with the employer’s objectives.¹⁰¹ Similarly, the Legislature should discuss and develop a definition for “conflict of interest” to determine when a conflict can raise to the level that would allow an employer to take an adverse employment action against an employee. While creating such legislation would present some challenges, as evidenced by both the Colorado and New York statutes, specificity is necessary for an effective lifestyle discrimination statute.

VI. CONCLUSION

As more individuals begin logging on to social networking sites, the abundance of private information online will continue to grow exponentially. Without some protection for employees, employers will easily seek information about employee off-duty, off-site conduct in order to take adverse actions against employees. To protect private employees while protecting employer interests, California must pass a lifestyle discrimination statute. Without such protection, the expectation of privacy in California will shrink to such a degree that the right to privacy will seek to exist for off-duty, off-site behavior.

101. LIFESTYLE DISCRIMINATION, *supra* note 73.